

Claimant appeals and argues the medical testimony establishes her work-related accidents on June 29, 2000, and March 4, 2003, aggravated, accelerated and intensified the preexisting degenerative osteoarthritis in her knees. Thus, claimant requests the Board to reverse the preliminary hearing Order and grant her request for medical treatment and temporary total disability benefits.

Respondent argues claimant failed to meet her burden of proof that there is a causal connection between her severe degenerative osteoarthritis condition in her knees and either alleged slip and fall incident. Respondent requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board affirms the ALJ's Order.

It is undisputed that on June 29, 2000, the claimant was walking in to work and fell in the employer's parking lot. She landed on both her knees and hands. Her primary complaint was to her left wrist but she also complained of pain in her right knee. By August 1, 2000, Dr. W. David Fretz indicated that claimant had no more pain in her extremities. In January 2001, Dr. Fretz concluded claimant had non-occupational osteoarthritis and she was released from further care.

In February 2001, claimant went to her personal physician with complaints of knee pain but made no mention of the fall at work. Degenerative osteoarthritis was diagnosed. Claimant was provided anti-inflammatory medication.

Claimant continued to work for respondent throughout this time period. On March 4, 2003, claimant again suffered a slip and fall accident in respondent's parking lot. She fell backwards to the pavement landing on her bottom and hands. A report filed with respondent indicated she had injured her left wrist and right shoulder but there was no mention of injury or aggravation to her knees. The contemporaneous medical records make no mention of additional injury to claimant's knees. Ultimately, claimant was referred to Dr. Fred A. Rice and during his treatment claimant did not mention any knee problems.

On April 4, 2003, claimant sought treatment with Dr. Mark J. Maguire with complaints of knee pain which increased over the last few days, but claimant did not describe any particular injury. Dr. Maguire continued to treat claimant for her knee problems and performed arthroscopic surgery on her left knee on April 21, 2003. Dr. Maguire noted that her complaints were due to her degenerative arthritic condition. On July 14, 2003, Dr. Maguire performed a right total knee replacement. Dr. Maguire agreed that from his initial April 4, 2003, examination of claimant through her knee replacement surgery, the claimant never indicated the slip and fall accidents caused her knee pain.

The ALJ's Order dated July 7, 2003, contained the following recitation:

Quite clearly, the condition of claimant's knees was not caused solely by her work activities. The degenerative osteoarthritis present in both of claimant's knees did not occur spontaneously following either of her work-related accidents. However, to the extent either or both of those accidents aggravated, accelerated or intensified

her pre-existing degenerative condition, then she would be entitled to treatment and other benefits available under the Kansas Workers Compensation Act, K.S.A. 44-510 et seq. [sic]

After considering all of the evidence, particularly the claimant's testimony and those records generated by Dr. Maguire, the Court is not persuaded that claimant's present need for knee surgery to her right knee is causally related to either of her work related injuries. Although claimant referenced her knees in her accident report immediately following her June 2000 accident, she had very little if any treatment or complaints regarding her knee(s) until January of 2001. Then, she was told her problem was degenerative osteoarthritis, a condition wholly unrelated to her work-related injury. Even when she sought treatment from Dr. Maguire, on her own, approximately a month later, claimant didn't say anything to Dr. Maguire about the pain she was having in her knees having any relationship to her fall in June of 2000.

Claimant did not seek any treatment from February of 2001 until she fell again in March of 2003. Immediately following that fall, she filled out a report of injury and said nothing about having any problems or pain with her knees. Dr. Rice treated her for complaints to her wrist. When she went to see Dr. Maguire, her complaints were more severe but the same as they had been in February of 2001.¹

The ALJ concluded claimant's current need for medical treatment was not causally related to either slip and fall incident suffered and, therefore, denied claimant's request for temporary total disability compensation and medical treatment.

At claimant's office visit with Dr. Maguire on August 1, 2003, she volunteered the history of her two slip and fall accidents and told the doctor that she believed she had injured her knees in those accidents. On August 5, 2003, claimant's attorney sent Dr. Maguire a letter requesting the doctor's opinion whether the falls claimant suffered in June 2000 and March 2003 had aggravated, accelerated or intensified the condition of her knees. The doctor marked the answer yes to both that question as well as the follow-up question whether those falls accelerated claimant's need for bilateral knee replacements.²

The respondent then deposed Dr. Maguire and he agreed that in answering those questions posed in the letter from claimant's attorney, he was simply relying upon the history provided by claimant. Dr. Maguire agreed there should be a correlation between the traumatic incidents and the reported symptoms. After viewing the claimant's contemporaneous treatment records, Dr. Maguire further agreed the medical records did not provide corresponding complaints in relation to the two accidents.

After the second preliminary hearing on September 15, 2003, the ALJ noted:

¹ ALJ Order (Jul. 7, 2003) at 2-3.

² Maguire Depo., Ex. 2.

Dr. Maguire testified that he thought the claimant's prior work injuries aggravated, accelerated, or intensified the claimant's knee conditions and her need for treatment of those conditions. However, Dr. Maguire stated that his only basis for that opinion was because the claimant, on 8-1-03, told him about the work accidents. This was the first time the claimant mentioned work accidents to Dr. Maguire as a possible source of her knee complaints, and this first mention occurred after the preliminary hearing order in which it was found that the claimant's knee injuries were not work related.³

The ALJ concluded that the timing of claimant's mention of her accidents at work was suspicious and inconsistent with her previous failure to mention those accidents during her ongoing treatment with the doctor. Consequently, the ALJ concluded claimant failed to meet her burden of proof that her need for medical treatment for her knees was causally related to the two work-related accidents.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁶ Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.⁷

After treating claimant for an extended period of time and attributing claimant's knee problems to her degenerative osteoarthritis, Dr. Maguire's change of opinion is not persuasive. The doctor admitted that the contemporaneous medical records do not corroborate claimant's contention that the slip and fall incidents caused an aggravation to her knee condition. Moreover, his opinion that the incidents accelerated her condition was simply based upon her recitation that she felt that was the cause of her condition. As the ALJ noted, the timing of her revelation and explanation of the relationship of the work

³ ALJ Order (Sep. 17, 2003) at 1.

⁴ K.S.A. 44-501(a) (Furse 2000).

⁵ K.S.A. 2001 Supp. 44-508(g).

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 rev. denied 249 Kan. 778 (1991).

⁷ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

incidents to her knee problems is at best inconsistent with her long time failure to mention the accidents or at worst suspiciously timed. The Board affirms the ALJ and finds claimant has failed to establish the need for medical treatment for her knees is causally related to either slip and fall incident.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated September 17, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director